RECORDS AND BRIEFS

No. 16-254

In The

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals of Texas, Fourteenth District

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

The Statement contained in the Brief for Petitioner is accurate except that the following should also be noted.

1.

Page 6 of the Brief for Petitioner states:

> Canada – the foreign State of destination – acceded to the Convention in 1989 and, pursuant to Article 21, filed an official declaration with the Government of the Netherlands, which stated that "Canada does not object to service by postal channels" under Article 10(a). 1529 U.N.T.S. 499 (1989).

Although this is true, Menon argued in the Fourteenth Court of Appeals and the Texas Supreme Court that as a matter of Canadian constitutional law, the law of Québec, with no implementing legislation, does not permit service of process by mail without going through Canadian and Quebecer government channels. Aplt. Br. 13, 28-32; Resp. Pet. Rev. 6-7, 15-18. More specifically, Menon argued that although the Convention was adopted by Canada, it has not been fully implemented by the province of Québec – as the Canadian constitutional structure requires – and therefore service on Menon in Québec must be through a Québec judge or "*l'huisser,*" not by direct mail. *Id.* The court of appeals did not reach this issue because the default judgment against Menon was reversed based on Menon's argument that the Convention does not authorize

service of process by direct mail regardless of Canadian constitutional treaty implementation requirements. J.A. 55, 58.

Thus, the above quoted portion of the Brief of Petitioner, although correct as far as Canada's national government is concerned, omits the important point that Québec's provincial government must accede to international treaties regarding the subject of service of process upon Quebecer citizens.

2.

The trial court's findings summarized in the Statement of Facts portion of the Brief for Petitioner on pages 7 through 8 are based on the trial court's findings upon Water Splash's motion for default, not after a contested hearing or trial.

Thus, although the Brief of Petitioner is correct in stating that these findings of fact are contained in the record, it is relevant that the findings are based on a no-answer default proceeding.

3.

Page 7 of the Brief of Petitioner states that Menon was employed by Water Splash "from 2001 to 2013." The quote should read "from 2011 to 2013." This is a typographical error.

SUMMARY OF THE ARGUMENT

The majority opinion from the Texas court of appeals, in interpreting the Hague Service Convention, concluded that it does not allow for a plaintiff to effectuate service of process by direct mail without government assistance. In deciding whether that interpretation is correct the Supreme Court should first determine whether a court that is interpreting unambiguous treaty text may resort to extra-textual materials. Water Splash and the dissenting opinion from the lower court say yes, whereas Menon and the majority opinion say no. Resort to extra-textual materials to interpret unambiguous treaty text violates the Constitution's separation of powers. The law-makers expressed their intent to adopt law for the nation as stated in the unambiguous treaty text. If an ordinary reading of that text results in only one meaning, the judiciary usurps the law-making function by imposing a different meaning by use of materials that are not the language actually adopted by the lawmakers.

The text contained in the Convention regarding service of process by direct mail without government assistance is unambiguous and supports the lower court's conclusion. Moreover, a reading of the text as a whole indicates that service of process was intended to be through the assistance of the simplified government offices specifically created under the Convention with the stated purpose of assisting foreign litigants to effectuate service of process. Water Splash's view is that the Convention was set up to create a government office to assist in effectuating service so that the

government office can then *not* be used; that is, direct mail without government assistance. This reading of the Convention violates the absurdity doctrine.

Use of customary international law as an aid to treaty interpretation has been abolished by the constitutional analysis contained in the *Erie* doctrine. However, even if *Erie* were not taken into consideration, use of customary international law as an aid to interpret unambiguous treaty text violates the Constitution's assignment of the power to say what the law is to the judiciary by having the judiciary defer to the international community's view of what our law is or what our law-makers adopted. Overlooking these constitutional problems to the use of customary international law as an aid to interpretation, customary international law itself, as codified by the Vienna Convention, supports the majority opinion's conclusion because it too places paramount emphasis on treaty text.

Finally, the executive's views regarding unambiguous treaty text should not be deferred to by the Supreme Court because, under the Constitution, the power to interpret the words of a statute or treaty is assigned exclusively to the judiciary, not the executive. The circumstances presented in this case do not warrant the Court's deferring more to the executive than to its own reasoning processes regarding the interpretation question at issue because the case turns on treaty text and not some *Chevron*-style technical area that the executive is better positioned to analyze.

ARGUMENT

I. The split in the lower courts is a disagreement over (1) what treaty interpretation methodology the Supreme Court should apply to unambiguous treaty text in any treaty, and (2) the proper interpretation of Article 10 of the Hague Service Convention regarding service of process by direct mail without government assistance.

The United States and 70 other nations have ratified the Hague Service Convention,[1] which employs the words "send" in Article 10(a) and "effect serve" in Article 10(b). These words have given rise to a split of authority across the United States as to whether the Convention allows a plaintiff to serve process upon a foreign defendant located in another country by merely placing the summons in the mail without the assistance of any governmental channel.[2] The Fourteenth Court of Appeals from Texas was also split regarding these words, with the majority concluding that service of process by direct mail is *not* allowed under the Convention, J.A. 55, 58, and Justice Christopher in dissent

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[1] The formal name of the Hague Service Convention is "Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters." 20 U.S.T. 361, 658 U.N.T.S. 169. J.A. 5-17.

[2] *Compare Ackermann v. Levine*, 788 F.2d 830, 838-839 (2d Cir. 1986); *Koehler v. Dodwell*, 152 F.3d 304, 307-308 (4th Cir. 1998); and *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), *with Nuovo Pignone SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); and *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989).

concluding that it *is*. J.A. 60. The disagreement among the courts to have considered the issue is fundamentally a disagreement over the proper interpretive methodology, with one side applying a textual-centric approach and the other side applying an extra-textual-centric approach. In this regard, Justice Christopher states in her dissenting opinion that "the majority fails to follow the United States Supreme Court's directions on the construction of treaties." J.A. 60.

Water Splash contends (consistent with the service-by-direct-mail cases and Justice Christopher's dissent) that this Court should look beyond the text of the Convention to conclude that the 71 signatory nations to the Convention intended for the word "send" to be synonymous with "effect service." This extra-textual methodology, according to Water Splash, results in the interpretative conclusion that a plaintiff in a forum country (say, Sri Lanka, Ukraine, or Malawi) may serve a lawsuit upon a defendant in another country (say, the United States, Mexico, or Canada) by direct mail without any governmental involvement. That is, a plaintiff or a plaintiff's lawyer may effectuate service by placing a summons in the mail. In making this point, Water Splash argues that resort to extra-textual sources is warranted because "the Convention's specific *scope* and *purpose* are limited to the regulation of transmittals for effectuating service abroad" it is necessary to look beyond the language of the Convention to ascertain what other international sources say the word "send" was intended to communicate. Pet. Br. 24 (emphasis added).

Menon on the other hand (consistent with the no-service-by-direct-mail cases and the majority opinion below) contends that the Court should not look beyond the text of the Convention because the text is not ambiguous and to do so violates the Constitution. This text-first methodology results in the interpretative conclusion that a plaintiff in the forum country may not effectuate service by direct mail without government involvement. That is, a plaintiff or a plaintiff's lawyer may not effectuate service by placing a summons in the mail.

Thus, the preliminary question in this case is one of interpretive methodology; that is, to what extent may resort be had to extra-textual materials, if any, when the text of a treaty is unambiguous? This Court has not squarely answered this important question.

II. The Constitution's division of powers between the executive, legislative, and judicial branches requires that the text-centric methodology be applied by the judiciary when interpreting unambiguous treaty text.

Although treaties are similar to contracts in that they are written agreements between two or more nations,[3] treaties are most definitely distinct from contracts because a nation party to a treaty is subject to,

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[3] *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though

not only the language of the treaty, but also to its municipal laws[4] that affect the application and enforceability of the treaty within that nation's political system. This important aspect of treaty law has been repeatedly confronted by this Court because a treaty is subject to the strictures of our Constitution.[5]

Thus, the structural aspects of our Constitution as they relate to treaty formation are the crucial starting point in the analysis of which methodology should be applied when generally interpreting and construing a treaty and specifically to the interpretation and construction of the Hague Service Convention in this case.

The United States Constitution distributes the authority of dealing with foreign nations among the three branches of government and establishes that ratified treaties are a source of binding law for our Nation. In this regard, the Supremacy Clause states that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme law of the Land; and Judges in every State shall be bound thereby." U.S. CONST. art. VI, cl. 2. This Clause means

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between nations."); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014).

[4] The term "municipal law" is used herein to denote the internal laws of a national legal system, such as the municipal laws of Canada or the municipal laws of the United States.

[5] *See, e.g., Medellin v. Texas*, 552 U.S. 491, 520 (2008) (A treaty is only obligatory on the United States "so long as the [treaty] agreement is consistent with the Constitution."); *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

that a fully implemented treaty is equivalent to an act of the legislature. *Medellin*, 552 U.S. at 538 (Breyer, J., concurring, joined by Souter and Ginsburg, JJ.). The Treaty Clause states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]" U.S. CONST. art. II, § 2, cl. 2. This Clause means that the President has the sole power to negotiate a treaty and that the Senate may ratify a treaty but only after it has first been negotiated by the President. *Zivotofsky v. Zivotofsky*, 135 S. Ct. 2076, 2086 (2015).

Congress too has an important role in treaty formation.[6] The Commerce Clause authorizes Congress "to regulate commerce with foreign nations[.]" U.S. CONST. art. I, § 8, cl. 3. And, Congress participates directly with a treaty becoming federal law by passing "implementing" legislation when the treaty is not made self-implementing by the language of the treaty itself, *Medellin*, 552 U.S. at 505; by passing legislation under the Necessary and Proper Clause needed to carry out the aims of the treaty, U.S. CONST. art. I, § 8, cl. 18; and by passing legislation that, for example, requires direct application of International Court of

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[6] *Zivotofsky*, 135 S. Ct. at 2090 ("In the world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not the President alone to determine the whole content of the Nation's foreign policy.").

Justice (ICJ) rulings or application of customary international law to treaties to which the United States is party, or that alters or completely preempts the subject matter of a treaty.[7]

This structural arrangement establishes that, "[i]n foreign affairs, as in the domestic realm, the Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" *Zivotofsky*, 135 S. Ct. at 2087 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Thus, the structural arrangement of our Nation's government is of immense significance in determining the proper methodology to be employed when interpreting any treaty, and the Hague Service Convention in particular. The Constitution places the law-making function in the case of treaty formation on the President as negotiator of a treaty and on the legislature as adopting the treaty, which the interpretive methodology applied by the judiciary should not alter.

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[7] *See, e.g., Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014) (Before the Foreign Sovereign Immunities Act (FSIA) preempted the field, which was traditionally a matter of "grace and comity on the part of the United States, and not a restriction imposed by the Constitution," this Court deferred to decisions of the political branch about whether and when to exercise judicial power over foreign states. Now the text of the FSIA prevails.); *Medellin*, 552 U.S. at 530 (ICJ judgment not binding in United States courts because treaty providing for ICJ jurisdiction not implemented by Congress); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721, 724 (2004) (Congress passed the Alien Tort Statute thereby allowing for a narrow aspect of customary international law to be the substantive basis for certain claims brought by foreigners in federal courts).

A related point about treaty interpretation bearing on our constitutional structure is that of whose intent is being interpreted. The cases occasionally state that the focus is on the intent of the drafters of a treaty. However, from the perspective of our Constitution, the focus is most properly on the intent of those persons empowered to consent to and ratify the treaty on behalf of the American people; namely, the President, Senators, and Congresspersons. The drafters' role in the treaty-making process is obviously important to the creation of the text, but the intent of the political figures that actually negotiate and consent to the terms and text of a treaty is most relevant as far as questions of interpretation and construction are concerned. Moreover, the political figures, under our Constitution, have the power to adopt substantive laws for our nations; the drafters do not. And because the political figures are not involved in the drafting of a treaty, they perforce focus on the text of a treaty and their perception of the meaning of the text.

This point is of great relevance to whether the text-centric approach to treaty interpretation is more in line with our constitutional structure than the extra-textual approach with respect to unambiguous terms of a treaty. For example, if our political figures read unambiguous text of a proposed treaty, it is unreasonable to impute upon them an intent to communicate a meaning *different* from what a normal reading of the text would indicate solely because extra-textual materials created before or after the treaty is adopted seem to indicate that some of the drafters intended to

communicate something else. Such an arrangement elevates the role of the drafters to law-making status, thereby diluting the authority of the political figures that our Constitution has designated as the proper law-making authorities. It also transfers to the judicial branch the power to make law differently from the law expressed in the unambiguous text adopted by the legislative branch.

To insure that the law-making function is maintained where the Constitution placed it – on the political figures – this Court should apply the text-centric methodology when interpreting unambiguous treaty text. That is, when the text of a treaty presents a clear meaning, the inquiry should stop without resort to extra-textual materials as an aid to interpretation. This objective approach focuses on the actual text of a treaty and emphasizes analysis of the words used; words which we know as a matter of fact were intended by the political figures to guide our affairs and to be applied by the Courts. Application of the extra-textual methodology when interpreting unambiguous treaty text looks to the subjective intentions of the parties that drafted and adopted the treaty. Attempting to determine the subjective intentions of a group of people is difficult or impossible, whereas unambiguous text is a clear guide of intent. Similarly, focus on the "object" or "purpose" of a treaty shifts the law-making function from the political branch to the judicial branch by allowing the judiciary to define the object and purpose of the treaty. But again, unambiguous treaty text, being objective evidence of what was intended to be

communicated, respects the law-making intentions of the authorities assigned the law-making function and avoids the risk of this power being improperly taken by the judicial branch in violation of the Constitution.

III. The judicial branch should not apply customary international law as an aid to interpret unambiguous treaty text unless the legislative branch has authorized the judicial branch to do so. Such use transfers the law-making function from the legislative branch to the judicial branch in violation of the Constitution.

The extra-textual methodology applied to interpretation of unambiguous treaty text defers to the practices and understandings of the international community, as reflected in a wide array of international sources, such as scholarly writings and judicial opinions produced through the workings of other nations' municipal laws. In this regard, Water Splash would have this Court look beyond the unambiguous text of the Hague Service Convention to ascertain what it claims are the relevant international communities' understandings of what the drafters intended by the text of the Hague Service Convention. This is an invitation to apply customary international law as a tool for interpreting the unambiguous text of a treaty. This line of thinking disregards our Constitution's mandate regarding the proper source of international law for the United States. This line of thinking also disregards the fundamental idea that law is a command of a

sovereign, and therefore, its origin and authority is located in a specific and identifiable source. Again, the President negotiates the terms of a treaty, the Senate gives advice to the President in his negotiations and consents (or not) after the negotiations are complete, and Congress in regulating commerce, implements a treaty if necessary, and legislates to carry out, fund, alter, or preempt the treaty.[8] This sharing of power is the sole mechanism for treaty formation in the United States, and it is of constitutional magnitude, meaning that any other purported source of "international" law is illicit.[9] The only federal law is the federal law adopted by our legislature; in short, the international

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[8] *Medellin*, 552 U.S. at 505 ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.' ") (ellipsis in original); *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshal, C.J.) ("In the United States . . . [o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

[9] See *Medellin*, 552 U.S. at 515 ("Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution – vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, § 2.").

community has no authority under our Constitution to impose its customary practices as law upon our legal system without our legislative consent. This conclusion is further bolstered by the fact that the Constitution gives Congress the power "[t]o define and punish . . . Offenses against the Law of Nations," U.S. CONST. art. II, § 8, which of course indicates that Congress must incorporate customary international law by statute before it can be recognized or applied by the judiciary.

Customary international law is defined as the law of nations as "established by the general consent of mankind," *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796), as "founded on the common consent as well as the common sense of the world," *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863), and which is "generally accepted" by the "common consent of mankind," *The Scotia*, 81 U.S. (14 Wall.) 170, 187-188 (1871). "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1986). It, by definition, evolves over time as did the general common law applied by American courts in the Eighteenth Century. *See Swift v. Tyson*, 41 U.S. 1 (1842), overruled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It goes without saying that international law is of grave significance to our Nation, and because of this, "United States courts apply international law as part of our own in appropriate circumstances[.]" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423

(1963) (refusing to apply customary international law as part of our own under the circumstances), *rev'd by* 22 U.S.C. § 2370(c); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("international law is part of our law"). That is not to say however that we therefore should look to the international community's views at large as a source for international law as if it were our federal law absent its being adopted as law through our constitutionally mandated procedures, or that we should use those views as a means of interpreting unambiguous treaty text without the legislature telling us to do so. *United States v. Alvarez-Machain*, 504 U.S. 655, 667-668 (1992) (refusing the suggestion that customary international law should be used to aid in the interpretation of the extradition treaty at issue).

"International law" only becomes our law when it has been made law through the law-making steps contained in the Constitution. Likewise, the international community's general views regarding international law are only a proper source of law under our Constitution when those general views have been adopted through the law-making mechanisms of our Constitution. For example, a *treaty* adopted under our Constitution by the law-making authority is federal law; treaty text is a proper source of federal law if enacted by the law-making authority according to the requirements of our Constitution. A second example is *legislation* authorizing the use of customary international law or the use of a judgment from the ICJ in American judicial proceedings; the customary international law or ICJ judgment would be proper sources of federal law if enacted

by the law-making authority according the Constitution. In these examples, the treaty, customary international law, or ICJ judgments are made a part of United States law, and therefore, can and should be applied in and by American courts without offending the Constitution because the "international law" in those circumstances has been specifically made part of our law by the law-making authorities in conformity with the Constitution.

The distinction of international law as a proper or improper source of federal law comes clearly to the forefront when a party attempts to directly apply customary international law in a United States Court or, as in this case, when a party attempts to use customary international law as a tool of treaty interpretation, thereby elevating the extra-textual international materials above the unambiguous text of a treaty adopted by the President, the Senate, and Congress. The theory behind the argument that customary international law should be used as a tool for interpreting unambiguous treaty text is that the general understandings of the international community are entitled to prevail over the United States' authority to pronounce its own laws because United States courts have an obligation to respect the views of foreign nations. United States courts, however, have only one obligation, which is to apply the laws enacted by the constitutionally mandated law-making authority. The use of customary international law as a device of treaty interpretation in the face of unambiguous treaty language, *without* legislation allowing for such use, violates the precepts of the

Constitution because customary international law is *not* law of the United States, *unless* it has been properly adopted as federal law pursuant to the Constitution.

The concept of "general law" is anathema to our Constitution's assignment of the law-making function to the legislative branch. Under the now-defunct *Swift* doctrine, federal courts exercising diversity jurisdiction were required to apply "general federal common law" instead of the common law as articulated by the state courts, thereby emasculating state sovereignty on questions of state law. The philosophical underpinnings of the *Swift* doctrine were that the general law is not strictly local in nature, that state court decisions do not constitute laws per se but are only some evidence of what the law actually is, and therefore, that the law is not *made* by any sovereign authority but is *found* through analysis of general principles and doctrines. The *Swift* doctrine violates the constitutional authority of states and rests on the outmoded theory of preexistent law, implies that judges reach their decisions through a deductive process, rejects the idea that judicial decisions "make law," and denies that law is based on the authority of a sovereign. The general law was thus viewed much like a natural law-like Platonic Form,[10] a mysterious "brooding omnipresence in

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[10] For a description of Platonic Forms theory, see Bertrand Russell, THE HISTORY OF WESTERN PHILOSOPHY 121-122 (Simon & Schuster 1972) (1945).

the sky,"[11] that reigned supreme to all man-made laws. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in judgment, joined by Rehnquist, C.J., and Thomas, J.).

The general-law principle of the *Swift* doctrine allowed the federal courts to unify the varied state laws into one system at the expense of state sovereignty and at the expense of the Constitution. The constitutional infirmities inherent in the metaphysics of the *Swift* doctrine came tumbling down with the landmark *Erie* holding that is nicely summarized in the oft-quoted statement that "there is no general federal common law[.]" *Erie Railroad Co.*, 304 U.S. at 78; *see also Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("There is no common law of the United States in the sense of a national customary law[.]"). *Erie* cemented once and for all the view that law is made by an identifiable and known sovereign authority, which in the case of America, is spelled out in the Constitution.[12] It is worth noting that

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[11] *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified[.]").

[12] *Sosa*, 542 U.S. at 730 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction that federal courts have no authority to derive 'general' common law.") (citation to *Erie* omitted).

Erie did not excise natural law[13] thinking from our constitutional system; rather, it removed it from the judiciary's role of interpreting and applying the laws.[14] The legislature is free to use whatever reasoning it likes (within the limits of the Constitution) in deciding what legislation to enact as the law of the United States. That includes enacting laws that it considers to be consistent with natural law or customary international law. The judiciary, however, cannot use that sort of reasoning as a basis for interpreting or applying the laws without disturbing the balance of power set by the Constitution.

The *Swift-Erie* story is directly relevant to the question of whether customary international law can be applied to interpret the unambiguous text of a treaty without violating the Constitution's assignment of the law-making function to the legislative branch. *Sosa*, 542 U.S. at 725-726.[15] Customary international

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[13] Natural law has an important place in American legal history. *See, e.g.*, THE DECLARATION OF INDEPENDENCE, preamble (U.S. 1776) (invoking the Laws of Nature); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); see also Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW 1335-1341 (3d ed. 2000).

[14] Although natural law theory is not an exact science (that puts it mildly), it is fairly uniformly agreed that positive law as made by human institutions is the concrete and enforceable law, whereas natural law is the unseen force that animates the lawmaker's desire to adopt good positive law. See John Finnis, NATURAL LAW & NATURAL RIGHTS 26-29 (2d ed. 2011). It follows, then, that law-makers (not judges) are the ones posed to divine natural law so as to be inserted in the positive law they adopt.

[15] See also Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Curtis A.

law is, by definition, general law in the metaphysical sense contemplated by the *Swift* doctrine and struck down by *Erie*. Because of this, a court must identify the sovereign source for each rule of law. Under our Constitution, the sovereign authorities that make law are the federal government and the states. Thus, any law applied by federal or state courts must be federal or state law adopted under the constitutions of those governments. These are the only proper sources of law. Law as general in the *Swift* sense is no longer the philosophical underpinning of law as a source of authority in the United States constitutional system. Our current understanding of law as a source of authority is that it emanates solely and exclusively from the Constitution, which places the law-making function in the legislature, not in the judiciary to be found from the common understandings at large. Thus, customary international law cannot properly be used as authority for interpreting unambiguous treaty text because to do so undermines the proper authority of the sovereign United States of America; that authority is the President, the Senate, and Congress. If the text adopted by our law-making authority is unambiguous, it encroaches upon the authority's power to deviate from the meaning of the text by resort to extra-textual

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Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-853 (1997) ("After *Erie*, a federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the general common law.").

sources, especially when those sources were created after the treaty was adopted. Justice Scalia summed up the problem as follows:

> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

Sosa, 542 U.S. at 750 (Scalia, J., concurring in part and concurring in judgment, joined by Rehnquist, C.J., and Thomas, J.). Application of the extra-textual methodology to unambiguous treaty text so as to allow for the use of customary international law does exactly what Justice Scalia warned of.

It is axiomatic that our courts should respect the opinions and views of other nations. *Abbott v. Abbott*, 560 U.S. 1, 16 (2010); *Sanchez-Llamas (Moises) v. Oregon*, 548 U.S. 331, 355 (2006); *Breard v. Green*, 523 U.S. 371, 375 (1998) (per curiam). But those opinions are most definitely no more authoritative than the logic of a scholarly article, an advocate's brief, or a thoughtful citizen's letter to his or her President, Senator, or Congressperson. It is the strength of the logic that is authoritative (not the speaker from whence the message

comes) when the "source" being considered is not actually federal law. The only proper law is the law adopted pursuant to Constitutional law-making steps, which, in this case, are the words of the Convention adopted by the President, Senate, and Congress. For a court to use customary international law to interpret unambiguous treaty text improperly alters the balance of power established by the Constitution. When the unambiguous text of a treaty provides an answer, the law-making authority's intent has been isolated, the law has been interpreted, and the judiciary's inquiry should go no further. Such a method best insures the separation of the powers of our government as required by the Constitution.

There are of course circumstances where foreign opinions and laws are properly considered in American judicial proceedings. For example, a court does not offend our Constitution in applying the substantive law of another country where a treaty or American statute *requires* the use of the substantive law of another country. This is exemplified by *Abbott v. Abbott*, where child access and custody rights were established by Chilean law and those rights required this Court to determine the significance of the term "*ne exeat*" under the Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501, and the implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. § 11601-11610. 560 U.S. at 16-22. In that case, the treaty, which was properly made part of the federal law by our law-making authorities, required the courts to focus on the substantive rights that had been created in a foreign country; namely, the

custody rights of the parent as stated in a previous Chilean order pursuant to Chilean municipal law. Another example was *Sosa v. Alvarez-Machain*, where this Court concluded that Congress had long ago passed the Alien Tort Statute with the intent of specifically authorizing a narrow category of claims based on then-existing customary international law. But absent a specifically relevant reason authorized by our lawmaking authorities to rely on a foreign nation's views on a legal question, the general statement that foreign nations' views deserve respect is misleading insofar as the statement means that those views are more deserving of respect than other thoughtful views. At the very least, foreign nations' views should not supplant the views of this Court on questions of constitutional significance just because those questions arise in the context of a treaty.[16] Rather, this Court makes that determination based on its own assessment of the Constitution's requirements of how the law of the United States comes about. After all, it is this Court's role, not the international community's, to state what the federal law is. THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the [l]egislative body.").

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[16] *Medellin*, 552 U.S. at 522-523 ("[W]hile the ICJ's judgment in [*Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12] creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on filing of successive habeas petitions.").

Thus, where the words of a treaty are not ambiguous, it violates the structure of our Constitution to look to international sources beyond the text (especially where the sources were created after the treaty was adopted by our political figures) unless the text leads to an absurd result.[17]

IV. The judiciary should not defer to the executive's view regarding unambiguous treaty text because to do so violates the judiciary's constitutional duty to say what the law is.

The executive's views are often cited by litigants as especially authoritative in matters of treaty interpretation; and, this Court has said that those views are "entitled to great weight." *Lozano*, 134 S. Ct. at 1238 (Alito, J., concurring, joined by Breyer, and Sotomayor, JJ.); *Abbott*, 560 U.S. at 15; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982). This Court however has never, at least in modern times, deferred to the executive's views when interpreting the terms of an unambiguous treaty. Moreover, the executive's views do not warrant special weight just because

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[17] See *Medellin*, 552 U.S. at 554, 557 (Breyer, J., dissenting, joined by Souter, and Ginsburg, JJ.) (Assuming the conclusion that treaty language is unambiguous, the conclusion that the ICJ's judgment is not binding in U.S. court leads to an absurd result: "What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.*, that Congress must enact specific legislation to enforce it)?").

a treaty is involved, but rather only when there is something special about the executive's involvement in the subject that gives the executive special insight that cannot be duplicated at the judicial level. *See Abbott*, 560 U.S. at 40-43 (Stevens, J., dissenting, joined by Thomas, and Breyer, JJ.).

An apt analogy is *Chevron* deference given to administrative agencies regarding specialized subject matter that an agency deals with on a routine basis, thereby putting that agency in a superior position to understand the intricacies of the circumstances.[18]

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[18] *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865-866 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principles of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." "Judges are not experts in [pollution-emitting devices], and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of the everyday realities.").

However, even the bastion of *Chevron* deference is subject to the serious criticism that it "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). If that criticism were to someday topple the *Chevron* deference doctrine, there would remain no constitutionally valid basis for the judiciary's deferring to the executive's views on matters of legal interpretation.

In the case of a treaty where the text is clear, the executive is in no more of a superior position to interpret the words than any other thoughtful person. In fact, the Supreme Court is in a *better* position than the executive to interpret unambiguous treaty text, and therefore, the Supreme Court should give no deference to the executive's views; at least, that is, it should give no more deference to the executive's view than it gives to any other litigant's views insofar as the views are based in logic and thoughtful analysis. The deference is not to the speaker, but to the merit of what the speaker is saying.

The suggestion that the executive is in a better position to interpret unambiguous treaty text disregards the basic separation of powers of our government. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshal, C.J.). And, "[t]he construction of treaties is the peculiar

province of the judiciary[,]" not the executive. *Jones v. Mecham*, 175 U.S. 1, 32 (1899).

In short, the views of the executive under the circumstances of unambiguous treaty text are no more persuasive than are the views of an advocate for one of the parties and deference by the judicial branch to the executive branch under these circumstances upsets the basic balance of powers set up by the Constitution.

V. There is no ambiguity presented by the text of the Hague Service Convention regarding whether the intent was to allow service of process by direct mail without government assistance.

The Hague Service Convention applies to this case because Menon was served in Québec, Canada, where she is a citizen and resident. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) ("By virtue of the Supremacy Clause, U.S. CONST., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies."). Again, Water Splash argues that the Convention authorizes service by direct mail without governmental assistance, which is how Menon was served with process in the trial court.

The first step in addressing Water Splash's argument is to review the text of the Convention with an eye towards ascertaining whether the text is ambiguous regarding service of process by direct mail without governmental assistance. Article 10 of the Convention

is of particular relevance because it is the Article that Water Splash relies on for its service-by-mail claim; Article 10 states:

> Provided the State of destination does not object, the present Convention shall not interfere with
>
> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to ***effect service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to ***effect service*** of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination.

J.A. 8-9 (emphasis added). The words "send" and "effect service" are the crux of the controversy because, had the words "serve" or "effect service" been substituted for the word "send" in Article 10(a), the meaning advocated by Water Splash would be plausible. Because that did not happen, Water Splash is in the position of arguing that use of the word "send" in Article 10(a) was a mistake or sloppy draftsmanship. Pet. Br. 30.

Generally words of a statute or treaty are to be understood in their ordinary and everyday meaning. *See*

Helvering v. Hutchings, 312 U.S. 393, 396 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824). In line with this common-sense axiom, it is reasonable to conclude that when the text of a statute or treaty uses a particular word or phrase more than once, the intent is to communicate the same idea throughout; and conversely, when the text uses a word or phrase one or more times, and then uses a different word or phrase, the intent is to communicate a different idea. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

Reading the words of Article 10 in their ordinary and everyday meaning with the idea that an alteration of the written words was for a specific purpose, Water Splash's argument that use of the word "send" in Article 10(a) was a mistake or sloppy drafting does not hold up because it is not absurd to include a provision on direct mail regarding service of post-answer judicial documents (such as motions or discovery) within a Convention that seeks to simplify the procedures by which judicial documents are served. In fact, it is quite logical to include in the same place provisions for service of both types of judicial documents; many would conclude that it would be illogical *not* to group such provisions within the same instrument as "birds of a feather" which are like in kind. Moreover, it would be natural to provide by treaty for both types of service because of the need, in both situations, for one nation's

legal process to encroach upon the territorial jurisdiction of another, but only by consent to do so. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). In this regard, the Fifth Circuit, in addressing Article 10's variations between the words "send" and "effect service," reasoned as follows:

> "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not presume that the drafters intended to give the same meaning to "send" that they intended to give "serve."

Nuovo, 310 F.3d at 384 (footnote omitted).[19]

Because there is a logical reason for the text to deviate – namely, to provide for service of both type of judicial documents – and the text of Article 10 read in its ordinary manner leads to the conclusion that service of both type of judicial documents are contemplated, the Court should conclude that the text of

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[19] The majority opinion from the Fourteenth Court of Appeals cited this quote in reaching its opinions in favor of Menon. J.A. 55.

Article 10 is unambiguous and that the variation between "send" and "effect service" was not "an obvious drafting error." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). However, the inquiry does not stop there because of the related axiom of interpretation that provisions of a statute or treaty should not be read in isolation of the whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). With that in mind, Article 10 should be read in the context of the remaining text of the Convention.

The preamble is an obvious starting place. It states that the signatories' desire is

> to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, . . . [and] to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure[.]

J.A. 5. Reasoning from the preamble, Water Splash's entire brief rests on the conclusion it draws from the preamble; namely, that "the Convention's specific scope and purpose are limited to the regulation of transmittals for effectuating service abroad." Pet. Br. 24.

Contrary to Water Splash's claim, the preamble does not express a desire to cover only service of initiating litigation documents, i.e., service of process. Certainly the preamble expresses a desire to encompass initiating documents; that is a given. The desires expressed in the preamble, as its words say, are to ensure

that when documents are served abroad they are given to the addressee with sufficient time to deal with them, *and* that the procedures create efficient cooperation between the governmental channels of the receiving and requesting nations.[20] There is nothing about these dual purposes that contemplates complete removal of governmental involvement in the initiating service of process procedures, which is the consequence of direct mail. On the other hand, it makes complete sense, consistent with the text of Article 10 and the remainder of the Convention, that after nations assist their citizens in initiating the legal proceedings by service of process, the follow-up litigation documents proceed by mail without governmental assistance. In short, Water Splash's key argument, that the "literal language of Article 10(a)" conflicts with "the specific purpose of the treaty," is not accurate. Pet. Br. 17. The language of Article 10 does not conflict with the stated purpose of the Convention; it naturally flows with the purpose.

Water Splash also looks to the words contained in the first part of Article 10 – "[p]rovided the State of destination does not object" – in conjunction with Article 21, which allows for a nation to state its "opposition to the use of methods of transmission pursuant to articles 8 and 10[.]" J.A. 13; Pet. Br. 25. Water Splash reasons that given a State's right to object (Article 21) to

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[20] See *Schlunk*, 486 U.S. at 704 ("Thus, the first stated purpose of the Convention is 'to create' appropriate means for service abroad, and the second stated purpose is 'to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure.' ").

use of postal channels (Article 10(a)), it is clear that service by mail does not include non-service-of-process documents because a party could nevertheless send documents by mail with impunity, in spite of an objection by a signatory nation to use of mail, because the mails are open to all. Pet. Br. 25. The response to this argument is simple: the penalty for use of mail to serve any document when a use-of-mail objection has been lodged would be non-enforcement of documents sent by mail from the forum State. *See Schlunk*, 486 U.S. at 705 ("[W]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention[.]"). Additionally, the "problem" would also apply to service-of-process documents.

Other than these arguments based on the text of the Convention, Water Splash relies exclusively on extra-textual sources. However, the remaining text of the Convention further supports the conclusion that Article 10(a) is not a mistake or sloppy drafting. Those remaining provisions are summarized in *Schlunk* as follows:

> The primary innovation of the Convention is that it requires each state to establish a central authority to receive request for service of documents from other countries. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law.

> The central authority must then provide a certificate of service that conforms to a specified model. A state also may consent to methods of service within its boundaries other than a request to its central authority. The remaining provisions of the Convention . . . limit the circumstances in which a default judgment may be entered . . . and provide some means for relief from such a judgment.

486 U.S. at 698-699 (citations omitted).[21] These remaining provisions encompass the idea that the governments of the signatory states will be involved,

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[21] *Article 1* states that the "Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Article 2* requires each nation to designate a Central Authority "to receive requests for service[.]" *Article 3* requires that a "authority or judicial officer . . . forward to the Central Authority . . . the document to be served[.]" *Article 4* states that the Central Authority shall inform an applicant if the document sought to be served "does not comply with the provisions" of the Convention. *Article 5* states that the Central Authority "shall itself serve the document or shall arrange to have it served by an appropriate agency . . . (a) by a method prescribed by its internal law . . . upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." *Article 6* requires the Central Authority to provide a certificate stating that service was made or not. *Article 7* provides the form and languages to be used by the Central Authority. *Articles 8 and 9* provide that traditional service of process through diplomatic channels is still available in lieu of the Convention's procedures. *Article 11* states that the nations are allowed to agree to other "channels of transmission[.]" *Article 12* provides for payment of fees. *Article 13* provides for the nations' preservation of their "sovereignty or security[.]" *Article 14* provides for resolution of "[d]ifficulties which may arise in connection with transmission of judicial documents for service . . .

whereas the interpretation advocated by Water Splash results in the signatory nations *not* being involved.

Water Splash does not take the position that Article 10, in the context of the whole text of the Convention, is ambiguous; rather, it takes the position that treaties are special because they are agreements between nations, and therefore, when a court is called upon to interpret and apply a treaty, ambiguous or not, it must *always* resort to extra-textual materials.[22] This is simply not correct. For the reasons already discussed, a court should first determine if treaty text is ambiguous; if it is not, the interpretive inquiry is over, unless the unambiguous text leads to an absurd result. Even the *amicus curiae* brief filed by the United States says on page 10 that "[i]f the text and context of the treaty are ambiguous, the Court 'may look beyond the written words' [of the treaty.]" This seems to agree with a principle point in this brief; namely, that the Court should not look beyond the written words of a treaty if those words are unambiguous.

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through diplomatic channels[.]" *Articles 15 and 16* provide restrictions on taking default judgments and provisions for setting aside default judgments. *Article 17* states that service may be accomplished among the signatories in accordance with the Convention. *Articles 18 thru 31* spell out general clauses.

[22] Pet. Br. 16 ("[T]he dissent noted that because treaties are contracts between sovereign States, their interpretation is governed by different principles than questions of pure statutory construction, including principles that examine non-textual sources of meaning[.]"); and Pet. Br. 18-39 (Throughout the Argument, Water Splash assumes that extra-textual materials should always be considered in treaty interpretation methodology.).

Water Splash, the *amicus curiae* brief filed by the United States, the dissenting opinion by Justice Christopher, and the opinions going the way of service-of-process-by-mail all rely heavily on extra-textual materials for their conclusion precisely because the unambiguous text of the Convention does not support their conclusion – if the text supported the opposite conclusion, they would not need to resort to extra-textual materials. Also, the preliminary procedural premise underlying their conclusions is that given the special nature of a treaty, the courts are required to resort to extra-textual materials, *even if the treaty text is unambiguous*. Thus, this Court is squarely presented with the question of whether it can or should go beyond the unambiguous text of a treaty when called upon to interpret a treaty.

The idea that unambiguous treaty text should stop the inquiry absent an absurd result is not new to the Supreme Court. For example, in *Chan v. Korean Air Lines, Ltd.*, the Supreme Court said:

> These estimations of what the drafters might have had in mind are of course speculation, but they suffice to establish that the result the text produces is not necessarily absurd, and hence cannot be dismissed as an obvious drafting error. We must thus be governed by the text – solemnly adopted by the governments of many separate nations – whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention.

> The later may of course be consulted to elucidate a text that is ambiguous, *see, e.g.*, *Air France v. Saks*, 470 U.S. 392 (1985). But where the text is clear, as it is here, we have no power to insert an amendment.

490 U.S. 122, 134 (1989). And, in *Factor v. Laubenheimer*, the Supreme Court said:

> Until a treaty has been denounced, it is the duty of both the government and the courts to sanction performance of the obligations reciprocal to the rights which the treaty declares and the government asserts even though the other party to it holds a different view of its meaning.

290 U.S. 276, 298 (1933). The procedural rule that the judicial inquiry regarding interpretation of a treaty ends with unambiguous text is not only of constitutional magnitude for the reasons stated in the first part of this brief, it also makes good common-sense. This is because of the unwieldiness of requiring the reader (which includes the President, Senate, Congress, and the Courts) to not only look to the text, but also to the corpus juris of the entire world (i.e., customary international law) to decipher meaning, even if doing so would lead to the opposite of what the unambiguous text communicates.

Water Splash cites to *Schlunk* for the suggestion that a ccurt interpreting a treaty can look beyond unambiguous treaty text. *Schlunk* does not support that proposition. In that case, the plaintiff served "process

upon a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process." 486 U.S. at 696. The Supreme Court was called upon to determine whether the forum State may decide whether the Convention applies. The Court interpreted the Convention such that "the internal law of the forum is presumed to determine whether there is occasion for service abroad." *Id.* at 704.[23] There was an ambiguity as to whether the forum State or the receiving State decides if the Convention applies, and therefore, the Court resorted to extra-textual materials to answer the question. Thus, *Schlunk* does not support the conclusion that a court should resort to extra-textual materials when interpreting unambiguous treaty text. If fact, during the oral argument of *Schlunk*, the question was specifically asked of petitioner's counsel whether the Court could look beyond the unambiguous text. No clear answer was received. Although this question was on the minds of the Justices, it needed not be answered because of the ambiguity presented in that case. The Court now has the question squarely before it. If it concludes that the text of Article 10 is unambiguous, the

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[23] See also *id.* at 708 (Brennan, J., concurring, joined by Marshall and Blackmun, J.J.) ("[T]he Court holds, and I agree, that a litigant may, consistent with the Convention, serve process on a foreign corporation by serving its wholly owned domestic subsidiary, because such process is not 'service abroad' within the meaning of Article 1. The Court reaches that conclusion, however, by depriving the Convention of any mandatory effect, for in the Court's view the 'forum's internal law' defines conclusively whether a particular process is 'service abroad,' which is covered by the Convention, or domestic service, which is not.").

Court should not look to extra-textual materials to aid in its interpretive duties for the reasons stated in this brief.

Entertaining Water Splash's request (and the United States' request contained in its *amicus curiae* brief) to go outside the text of the Convention, much of the emphasis is on other nations' views of how the text should be interpreted. This, of course, is to resort to customary international law, which has been discredited by *Erie*, as discussed above. A part of this aspect of Water Splash's claim is that many nations have not objected (under Article 21) to mail as allowed by Article 10. However, this line of argument assumes that the nations that have lodged statements of non-opposition or opposition understood the treaty in the same way that Water Splash urges this Court to accept. The fact of non-opposition or opposition by a nation in no way shows that that nation interpreted the Convention in the manner that Water Splash does; it is just as likely that those nations interpreted the Convention in the way that Menon does. In fact, given the unambiguous text, it is more likely that they interpreted the Convention the way that Menon does. A statement of non-opposition or opposition would be to mailing *any* judicial documents by the litigants directly or by the governmental channels set up pursuant to the Convention.

As for the opinions of courts from other nations is concerned, that, again, is a resort to customary international law as a guide to interpretation of the Convention. If we are going to resort to customary international law as a guide, then we are perforce

obligated to also resort to the Vienna Convention, VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331, because, even though the United States has not ratified the Vienna Convention, it is a codification of the rules of customary international law applicable to interpretation of all treaties.[24] Article 31 of the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* at art. 31(1). That is, text is dominant with the clear inference that text should not be altered by extra-textual sources.

"Context" is defined, among other things, as "the text, including its preamble and annexes." *Id.* at art. 31(2). Context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the of the treaty" and "[a]ny instrument which was made by one or more

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[24] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) ("The International Court of Justice . . . has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties."); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note, at 144-145 (1987) (discussing the Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention in the United States); 2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 218-219 (1966) (The Vienna Convention was an attempt to "codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties."); *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 37 (Mar. 31); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 43 (July 9).

parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *Id.* Supplementary means of interpretation are also permitted for limited purposes. Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

Id. at art. 32. Again, text is dominant and its clear meaning should not be altered by resort to extra-textual materials. In other words, the textual focus of the Vienna Convention (that is, customary international law) is paramount, allowing for supplementary means of interpretation only after the text of a treaty demonstrates an ambiguity or an absurd result. In others words, the majority opinion in the Texas court of appeals applied the proper rules of treaty interpretation even through the lens of customary international law. *See Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.").

It is interesting to see that the brief filed by Water Splash and the *amicus curiae* brief filed by the United States cite to international authorities for their conclusions, not for their analysis. As discussed in this brief above, the point of considering other viewpoints (*e.g.*, the views of other nations' courts, scholars, the executive branch, the brief of a litigant) is not for the conclusions of those viewpoints, but for the reasoning behind the conclusions. If for example a person's conclusion is based on the reasoning that "a crow flew south at high noon," then that person's viewpoint (i.e., conclusion) is of no value. Assembling the conclusions of various nonbinding sources as a basis for convincing this Court to decide one way or another is of little to no value because this Court's conclusion must be based on logical reasoning, not vote counting. Most of the authorities cited by the briefs of Water Splash and the United States are European. It is worth noting that the European starting point for interpretation of legal instruments is diametrically opposed to the Vienna Convention and American legal thinking as exemplified by a volume from a European legal treatise similar to the American Restatement of the Law; namely, Article 5:101 from Principles of European Contract Law, which states:

> A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

Ole Lando & Hugh Beale, THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, Art. 5:101 (2000). It would be quite shocking for an American lawyer to advocate in an American court

that a contract or statute should be interpreted in a way that differs from the literal meaning of the words, but this is precisely the mind-set of the European community (at least according to one of its lead treatises) that might explain the European perspective on treaty interpretation, which happens to conflict with customary international law as codified in the Vienna Convention. The point is that the conclusions of the differing international views are not as relevant as are the reasoning of how those conclusions were arrived at. Based on what Water Splash has provided, only the conclusions are available.

Water Splash also claims that the French version of the Hague Service Convention supports its interpretation. However, even the Vienna Convention states that when a treaty is authenticated in two or more languages, the "terms of the treaty are presumed to have the same meaning in each authentic text." VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331, Art. 33. The point that Water Splash attempts to make by discussing the French version versus the English version is that "service" means service of process and only service of process. The argument is unconvincing because all judicial documents must be "served." The pedantic distinction that service-of-process documents are "served" but other judicial documents exchanged throughout a lawsuit are not "served" flies in the face of common usage. That is, when a lawyer serves discovery or motions on the opposing lawyer, he or she "serves" those documents. No one practicing law would quibble with such an obvious statement or usage of the

word serve. But it would be strange indeed if one lawyer were to say to another lawyer, "I do not understand what you mean when you tell me you served me with discovery." This is important to Water Splash because it wants to establish that the drafters never considered "service" of non-service-of-process documents by "sending." In a world where lawyers and the public actually litigate disputes, however, it is certainly possible to serve non-service-of-process documents by various means.

VI. Policy concerns support the interpretation of the lower court's reading of Article 10(a).

Justice Brennan's concurring opinion in *Schlunk* expressed incredulity at the possibility that a nation focused on due process would allow service of process via postal channels. *Schlunk*, 486 U.S. at 707 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.). He wrote:

> Admittedly . . . the Convention's language does not prescribe a precise standard to distinguish between "domestic" service and "service abroad." But the Court's solution leaves contracting nations free to ignore its terms entirely, converting its command into exhortation. Under the Court's analysis, for example, a forum nation could prescribe direct mail service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service

> complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant.

Id. at 710-711. He uses the idea of direct mail as a possibility, not as actual valid interpretation of the Convention, but rather as a way to emphasize the improbability that a nation would actually authorize such service of process as a means of comporting with due process. The point from a policy perspective is that such service is not conducive to fairness, and it would encourage entry of judgments against foreign nationals not having knowledge of the underlying proceedings. Entry of judgments against foreign nationals without being given actual notice was one of the very concerns the Convention was designed to protect against.

The consequences of affirming the holding of the lower court are that American courts will not allow judgments to be entered against signatory nations' citizens when they have been served through mail with no government involvement. Foreign governments will surely appreciate this protection provided to their citizens. As for the argument that not being able to use the mails will increase the costs of litigation, the Convention specifically provides for the creation of a system that is designed to be cost efficient and fast. The argument that direct mail without using the governmental channels specifically set up to handle service requests is an affront to the system itself. The incongruity of the argument is patent: it claims that, on the

one hand, the system set up by the Convention provides an efficient and fast governmental channel through which process may be accomplished, but on the other hand, the system is cumbersome and costly, and therefore litigants can by-pass the system's involvement by direct mail service. That is, set up a system to avoid the system.

Additionally, there is the counter-argument that foreign nationals that obtain judgments against American citizens after service by mail will not be able to execute those judgments in American courts if the Supreme Court follows the lower court's holding. However, even if the Supreme Court does not follow the lower court's holding, American courts will nevertheless not allow for enforcement of default judgments based on mail if there is no actual notice. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). Thus there is no serious inconvenience to the foreign nations. Moreover, such judgments would be enforceable in nations that have interpreted the Convention to allow service of process by mail.

VII. The problem of Canadian constitutional law and Québec's not implementing the Convention.

Menon argued in the lower courts that the service by mail was not proper (1) under Article 138 of the Code of Civil Procedure of Québec because the service by mail was not obtained in the district of the place in which the written proceeding was served, CODE CIV. P.

QUÉBEC, art. 138; (2) Québec has no implementing legislation regarding the Hague Service Convention as required by the Canadian Constitution,[25] in which case, service must be by traditional diplomatic channels (*e.g.*, letters rogatory); and (3) the possible administrative implementation of the Hague Service Convention by Québec as indicated by the Hague Conference website shows that Water Splash, Inc. failed to comply with the Québec regulations regarding service of process.

These arguments were not reached by the Texas court of appeals, and therefore, if the Supreme Court disagrees with the majority opinion's holding, it should reverse for Menon's additional arguments to be considered.

CONCLUSION

For these reasons the judgment below should be affirmed, or alternatively, remanded to the Fourteenth

[25] CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95, *Canada Attorney-General for Canada v. Attorney General for Ontario*, [1937] 1 D.L.R. 673, *Capital Cities Communications, Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-173, 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 11.4(a) (5th ed. 2007) ("a treaty which requires a change in the internal law of Canada can only be implemented by the enactment of a statute which makes the required change in law").

Court of Appeals of Texas for consideration of the arguments that were not reached.

Respectfully submitted,

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